# IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

DUONG QUE TRANG	§	
Plaintiff,	§	
	§	
V.	§	
	§	Civil Action No. 1:13-cv-00044
TAYLOR BEAN & WHITAKER	§	
MORTGAGE CORP., U.S. BANK N.A.	§	
BARRETT DAFFIN FRAPPIER TURNER	§	
& ENGEL, LLP,	§	
	§	
Defendants.	§	

# PLAINTIFFF'S RESPONSE TO DEFENDANT BARRETT DAFFIN'S MOTION TO DISMISS.

NOW COMES DUONG QUE TRANG, Plaintiff, files this Response to Defendant Barrett Daffin's Motion to Dismiss, showing as follows:

I.

## PROCEDURAL HISTORY

- 1. Plaintiff includes by reference all documents on file with the Court as of this filing. On December 12, 2012, Plaintiff filed her case in the 250<sup>th</sup> District Court of Travis County, Texas. On January 9, 2013, Barrett Daffin filed in said state court its Original Answer and Affirmative Defense. (See Exhibit A, Answer of Barrett Daffin, filed and served on Plaintiffs. Curiously, despite the Court's order to file all documents, this important, and for the purposes of this motion, dispositive, state court document has not been filed with this Court.)
- 2. On January 16, 2013, Defendant U.S. Bank, N.A. filed its Notice of Removal and Barrett Daffin filed its Consent to Removal. Also on January 16, 2013, Barrett

Daffin filed its Motion to Dismiss for Failure to State a Claim pursuant to Federal Rule of Civil Procedure 12(b)(b)(6).

II.

#### **ARGUMENT**

- 3. Federal Rule of Civil Procedure 12(b) states, in pertinent part, "A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed." Federal Rule of Civil Procedure 81(c) states, in pertinent part,
  - (c) Removed Actions.
    - (1) Applicability. These rules apply to a civil action after it is removed from a state court.
    - (2) Further Pleading. After removal, repleading is unnecessary unless the court orders it. A defendant who *did not answer before removal* must answer or present other defenses or objections under these rules within the longest of these periods:
      - (A) 21 days after receiving—through service or otherwise—a copy of the initial pleading stating the claim for relief;
      - (B) 21 days after being served with the summons for an initial pleading on file at the time of service; or
  - (C) 7 days after the notice of removal is filed.
- 4. Barrett Daffin's motion to dismiss must be denied. It filed an answer in state court prior to removal. The motion is in violation of FRCP 12(b) and 81(c). *Nationwide Bi-Weekly Administration, Inc. v. Belo Corp.*, *512 F.3d 137 (5<sup>th</sup> Cir. 2007)*.

#### **PRAYER**

WHEREFORE PREMISES CONSIDERED Plaintiff prays the Court deny Barrett Daffin's 12(b)(6) motion to dismiss.

Respectfully submitted,

**David Rogers, Attorney at Law** 2525 Wallingwood Dr., Suite 600 Austin, Texas 78746 (512) 923-6188

(512) 457-0349 (fax) DARogers@aol.com

/s/ <u>David Rogers</u>

David Rogers

State Bar #24014089

Attorney for Plaintiffs

## **CERTIFICATE OF SERVICE**

Pursuant to Federal Rules of Civil Procedure, a true and correct copy of the foregoing has been sent on this the 31<sup>st</sup> day of January 2013 to all parties of record via the method indicated as follows:

Mark D. Hopkins State Bar No. 00793975 12117 Bee Caves Rd., Suite 260 Austin, Texas 78738 (512) 600-4320 (512) 600-4326 Fax Attorneys for Barrett Daffin

B. David Foster Ryan D.V. Greene 100 Congress Avenue, Suite 300 Austin, Texas 78701

Robert T. Mowrey LOCKE LORD BISSELL & LIDDELL LLP 2200 Ross Avenue, Suite 2200 Dallas, Texas 75201-6776 Attorneys for US Bank

/s/ David Rogers

David Rogers Attorney for Plaintiff